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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

NO._____

JORGE ABISLAIMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DRIVER OF A MOTOR VEHICLE WHOSE CAR IS LAWFULLY PARKED IN A PRIVATE HOSPITAL PARKING LOT IN THE MIDDLE OF THE NIGHT HAS A REASONABLE EXPECTATION OF PRIVACY?

II. WHETHER EVIDENCE WHICH CAN ONLY BE OBSERVED THROUGH USE OF A HIGH POWERED TELESCOPIC CAMERA IS IN PLAIN VIEW?

III. WHETHER A DEFENDANT HAS STANDING TO CHALLENGE THE LEGALITY OF HIS ARREST AND WHETHER EVIDENCE SEIZED AS A RESULT OF THAT ILLEGAL ARREST MUST BE SUPPRESSED AS BEING THE FRUIT OF THE POISONOUS TREE?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, JORGE ABISLAIMAN, and the State of Florida.

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II. EVIDENCE WHICH CAN ONLY BE OBSERVED THROUGH USE OF A HIGH POWERED TELESCOPIC CAMERA IS NOT IN PLAIN VIEW.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Petitioner JORGE ABISLAIMAN respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Florida Third District Court of Appeal which discretionary review by the Florida

Supreme Court was denied.

OPINIONS BELOW

On August 31, 1982, the Honorable Gerald Kogan, Circuit Judge of the Eleventh Judicial Circuit of Florida, entered an order granting Defendant's Motion to Suppress Illegally Seized Evidence and Oral Statements. That Order is reproduced in the Appendix. On direct appeal by the State of Florida, the Florida Third District Court of Appeal affirmed in part, reversed in part, and remanded. State v. Abislaiman, 437 So.2d 181 (Fla. 3d DCA 1983). That Opinion is reproduced in the Appendix. A Motion for Rehearing and Alternative Motion for Rehearing En Banc or Certification of Question of Great Public Importance was denied on September 28, 1983. That Order Denying Defendant's Motion for Rehearing is

reproduced in the Appendix. On April 18, 1984, the Supreme Court of Florida denied ABISLAIMAN's Petition for Review. That Order Denying ABISLAIMAN's Petition for Discretionary Review in the Supreme Court of Florida is reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). This Petition is filed within the authorized time period following the Florida Supreme Court's Order denying discretionary review.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause....

STATEMENT OF THE CASE[1/]

At 2:30 A.M. on January 21, 1980, JORGE ABISLAIMAN ("ABISLAIMAN") drove his car into the private parking lot of the Mercy Hospital emergency room. He parked the car at the far end of the lot in a legal parking space and remained there for three to five minutes, with no one entering or exiting the car. (T. 5-7). These actions were observed via a security camera by Officer Carlos Nieto ("Nieto"), an off-duty City of Miami policeman who worked part-time as a hospital security guard. (T. 4-6).

1/ The following symbols are utilized throughout this brief: "R" denotes Volume I of the Record on Appeal of the State court proceedings (pages 1-57) which contains pleadings, orders, and other documents filed with the trial court; and "T" indicates a reference to the transcript of the Motion to Suppress hearing contained in Volume II (pages 1-57).

Nieto's attention became focused upon the people inside ABISLAIMAN's car, but he could not tell what those people were doing. (T. 7-8). Nieto neither observed any illegal activity in or about the vehicle, nor did he believe that any hospital regulations were being violated. (T. 24-26). Using remote control equipment located in the monitor room, Nieto purposely activated the zoom lens on the camera to look inside the vehicle. (T. 8, 26-27). The zoom lens capabilities are so powerful that Nieto was able to peer into the vehicle and observe all movement therein without leaving the hospital security office. (T. 26). Nieto's use of the zoom lens allowed him to make observations and movements that he could not otherwise see with his eyes. By using the zoom lens, Nieto observed ABISLAIMAN rolling what

appeared to be a cigarette. (T. 9, 28-29). Nieto further observed what appeared to be a revolver in ABISLAIMAN's waistband when he lifted his shirt. (T. 10, 28-29).

Based on the above observations, Nieto radioed for a marked unit to assist him in a possible arrest. (T. 10). When Officer Raymond Castillo arrived, the two officers approached the vehicle and asked both occupants to exit the vehicle. (T. 12, 31-34). After frisking ABISLAIMAN for weapons, Nieto immediately reached into the vehicle for the revolver. (T. 12-13). A further search of the vehicle disclosed five methaqualone tablets on the floor of the vehicle wrapped in a napkin and 3.3 grams of marijuana on or near the passenger seat. (T. 14-35). When Nieto asked ABISLAIMAN about the gun, ABISLAIMAN said that the gun was

there because of Miami's high crime rate. (T. 17).

JORGE ABISLAIMAN was charged with carrying a concealed firearm, possession of three grams of marijuana, and possession of five methaqualone tablets. ABISLAIMAN's Motion to Suppress physical evidence and statements was granted by the trial court, which ruled that the warrantless use of a high powered "zoom" lens camera by a police officer to peer into the otherwise unseen interior of an automobile lawfully parked on private property was inconsistent with constitutional protections against unreasonable searches and seizures.

On appeal by the State of Florida, the Third District Court of Appeal reversed the order suppressing the physical evidence, not by addressing the crucial issue involving the law

enforcement use of this sophisticated technology, but by holding that ABISLAIMAN "had no reasonable expectation of privacy even from such an intrusion as occurred here." State v. Abislaiman, 437 So.2d 181, 183 (Fla. 3d DCA 1983). The Third District Court of Appeal did not address the merits of the search issue.

ABISLAIMAN sought discretionary review in the Supreme Court of Florida. That court denied ABISLAIMAN's Petition for Review. All proceedings have been stayed pending disposition of certiorari review by the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

I. THE DRIVER OF A MOTOR VEHICLE WHOSE CAR IS LAWFULLY PARKED IN A PRIVATE HOSPITAL PARKING LOT IN THE MIDDLE OF THE NIGHT HAS A REASONABLE EXPECTATION OF PRIVACY.

II. EVIDENCE WHICH CAN ONLY BE OBSERVED THROUGH USE OF A HIGH

POWERED TELESCOPIC CAMERA IS NOT IN PLAIN VIEW.

III. A DEFENDANT HAS STANDING TO CHALLENGE THE LEGALITY OF HIS ARREST AND EVIDENCE SEIZED AS A RESULT OF THAT ILLEGAL ARREST MUST BE SUPPRESSED AS BEING THE FRUIT OF THE POISONOUS TREE.

I

THE DRIVER OF A MOTOR VEHICLE WHOSE CAR IS LAWFULLY PARKED IN A PRIVATE HOSPITAL PARKING LOT IN THE MIDDLE OF THE NIGHT HAS A REASONABLE EXPECTATION OF PRIVACY

The Fourth Amendment to the United States Constitution guarantees to all people the right "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." When a Fourth Amendment violation takes place, the exclusionary rule may be asserted as one form of remedy. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421 (1978); United States v. Calandra, 414 U.S. 338, 347, 94 S.Ct. 613, 619 (1974). However, the doctrine

of standing limits application of the exclusionary rule in that "only defendants whose Fourth Amendment rights have been violated [may] benefit from the [exclusionary] Rule's protections." United States v. Salvucci, 448 U.S. 83, 87 100 S.Ct. 2547, 2550 (1980), citing Rakas v. Illinois, supra at 134, 99 S.Ct. at 425; Alderman v. United States, 394 U.S. 165, 171, 89 S.Ct. 961 (1969).

The Constitution protects only legitimate expectations of privacy. When deciding standing questions, the focus is on the defendant's legitimate expectation of privacy in the premises searched. United States v. Salvucci, supra at 94, 100 S.Ct. at 2553; Rakas v. Illinois, supra at 143, 99 S.Ct. at 430; Katz v. United States, 389 U.S. 347, 353, 88 S.Ct. 507, 512 (1967); see United States v. Chadwick, 433 U.S. 1,

7, 97 S.Ct. 2476, 2481 (1977).

The scope of the privacy interests relevant to the Fourth Amendment is only that which a free people may legitimately expect. This expectation of privacy must be "one that society is prepared to recognize as 'reasonable'". Katz v. United States, supra at 361, 88 S.Ct. at 516 (Harlan J., concurring). No single factor is determinative when assessing the reasonableness of the asserted privacy expectation. Although property ownership is an important factor in considering whether an individual has an expectation of privacy, it is neither the beginning nor the end of the Court's examination. United States v. Salvucci, supra at 93, 100 S.Ct. at 2553. However, generally, one who has the right to exclude others from the property will in all likelihood have a

legitimate expectation of privacy. Such an ability to exclude is consonant with the authority of one who lawfully possesses, controls or owns the area in question. See Rakas v. Illinois, supra at 146 n. 12, 99 S.Ct. at 431 n. 12.

This Court in Rakas discussed the key factors which constitute proof of an expectation of privacy as determined in Jones v. United States, 362 U.S. 257, 80 S.Ct. 725 (1960) and Katz v. United States, supra. In Jones, the Court emphasized that Jones had a key to the subject premises and kept possessions there as a sufficient indication that he had dominion and control over the apartment and could exclude others from it. Rakas v. Illinois, supra at 154, 99 S.Ct. at 433. In Katz, the Court was examining the question of whether defendant had a legitimate expectation of privacy in a

telephone booth. The Rakas court, in discussing Katz, viewed his closing the door to the telephone booth behind him to exclude all others and paying the toll as significant indications of his expectation of privacy. Id. Other factors to be considered in determining an expectation of privacy are whether the defendant has taken measures to insure his privacy, and whether the items seized were in plain view. See United States v. Weber, 668 F.2d 552, 558-59 (1st Cir. 1981) cert.denied U.S. ___, 102 S.Ct. 2904 (1982); United States v. Bellina, 665 F.2d 1335 (4th Cir. 1981); United States v. Lupo, 652 F.2d 723, 727 (7th Cir. 1981) U.S. ___, cert.denied, 102 S.Ct. 2964 (1982). See, e.g.,United States v. Chadwick, supra at 11, 97 S.Ct. at 2483 (defendant locking personal effects inside footlocker manifests expectation

of privacy).

The fundamental constitutional error involved in the present case is the process of eliminating all legitimate privacy interests in a motor vehicle and its contents. In this regard, the Florida District Court of Appeal has gone too far in creating a totally new rule of law which substantially departs from existing constitutional law.

Although the court has recognized certain differences between one's expectation of privacy in automobiles and one's expectation of privacy in a residence and other property,[2] an individual still may have

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[2] The Court has recognized several reasons for the distinction between automobiles and other private property. First, the mobility of automobiles makes it impractical to obtain a warrant. See, e.g., United States v. Chadwick, supra at 12, 97 (fn.cont.)

a legitimate expectation of privacy in an automobile which the Court is willing to recognize as reasonable. United States v. Ross, ___ U.S. ___, 102 S.Ct. 2157, 2171 (1982)(the Court stated that although an individual has an expectation of privacy in a vehicle and its contents, such an expectation does not survive if probable cause is given

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S.Ct. at 2484; Chambers v. Maroney, 399 U.S. 42, 49-50, 90 S.Ct. 1975, 1980 (1970); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925). Second, an automobile "'travels public thoroughfares where its occupants, and contents are in plain view.'" United States v. Chadwick, supra at 12, 97 S.Ct. at 2484 citing Cardwell v. Lewis, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469 (1974). Third, states and localities regulate the condition and manner in which automobiles may be operated. Cady v. Dombrowski, 413 U.S. 433, 441, 93 S.Ct. 2523, 2528 (1973). In short, the configuration, use, and regulation of automobiles may dilute one's expectation of privacy. See Rakas v. Illinois, supra; United States v. Chadwick, supra; South Dakota v. Opperman, 428 U.S. 364, 368, 96 S.Ct. 3092, 3096 (1976); Cardwell v. Lewis, supra at 590, 94 S.Ct. at 2469; Cady v. Dombrowski, supra at 441-442, 93 S.Ct. at 2528.

to believe that the vehicle is transporting contraband); United States v. Chadwick, supra at 12, 97 S.Ct. at 2484; Rakas v. Illinois, supra at 149-150, 99 S.Ct. at 433-434 (if the passengers of the vehicle could have established a legitimate expectation of privacy in the areas of the vehicle searched, they would have been granted standing to contest the search); South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976)(defendant had expectation of privacy in automobile sufficient to challenge inventory search of vehicle after it was impounded).

The cases which discuss the differences between automobiles and other private property do so in the context of discussing the automobile exception to the warrant requirement. However, the automobile exception does not automatically apply whenever

automobiles are searched. As noted by the court in Coolidge v. New Hampshire, 403 U.S. 443, 461-462, 91 S.Ct. 2022, 2035 (1971), "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." In the same sense, simply because one has a **diminished** expectation of privacy in an automobile does not mean that one can never have a legitimate expectation of privacy which society is willing to call reasonable.

For example, in United States v. Posey, 663 F.2d 37 (7th Cir. 1981), cert.denied, ___ U.S. ___, 102 S.Ct. 1473, the defendant did not own the vehicle searched or the gun seized. However, the defendant did have his wife's permission to use the vehicle at the time of the search. The court concluded that the defendant had a legitimate expectation of privacy in the

automobile because he was exercising exclusive control of the vehicle pursuant to his wife's permission at the time of the search. Id. at 41. Moreover, in United States v. Perez, 689 F.2d 1336 (9th Cir. 1982), the defendants, who did not own the vehicle in question, met their burden of establishing a reasonable expectation of privacy in the truck. The defendants in Perez made formal arrangements for transportation of narcotics in the vehicle. To make sure no one interfered with delivery of the narcotics, the defendants kept the truck under surveillance by riding in it or following it in another vehicle. The court determined that the foregoing factors were sufficient to establish a reasonable expectation of privacy in the truck. Finally, in United States v. Glasgow, 658 F.2d 1036 (5th Cir. 1981),

the court recognized that lawful possession and control with the right to exclude others indicates that a defendant had a legitimate expectation of privacy in an automobile. Id. at 1044.

The foregoing principles, when considered together with the opinion of the Third District Court of Appeal in this case, strongly suggest that the Florida courts misunderstood the constitutional expectation of privacy standard. The case under review effectively rules that automobiles can never be repositories of an expectation of privacy, notwithstanding one's careful attempts to keep the contents thereof hidden from view. This judicial elimination of a privacy interest in such a class of cases cannot be tolerated.

ABISLAIMAN clearly held a

legitimate expectation of privacy with respect to his activities in the vehicle on the night in question. In fact, that such a privacy expectation existed was so obvious that the trial court ruled that there was no "standing" problem.

> Questioning [by defense counsel]: ...it is my understanding there is a question in this case as to the defendant's standing to contest the search of his vehicle.
>
> The Court: I don't think that is necessary at all. It is obvious the car was under his control, in his possession....

(T. 42).

Every conceivably relevant factor to the issue of a reasonable expectation of privacy existed in this case. Abislaiman lawfully possessed the vehicle. He had a right to be in the private parking lot, and he legally parked the car. (R. 9-10). Abislaiman did not bandy his activities about in full view of the vehicle windows or

conduct his actions in an area streaming with public traffic. Nor was he situated in an environment where people can expect their activities to be noticed. Instead, the location of his car, the nature of his activities, the fact that his actions were all accomplished at waist level below the visibility through the windows, and the time of day, all serve to underscore his legitimate belief that he was not exposing himself to public view. Society would approve of this expectation.

This issue commands even greater importance when it is understood that the analytical approach utilized by the Florida courts is a total rejection of the Fourth Amendment with respect to automobiles. This rule emanating from the Florida court system is inconsistent with this Court's constitutional

framework. If it is constitutionally correct that a driver possesses no societally acceptable privacy expectation in an automobile, then this Court's decisions in United States v. Ross, supra, and Belton v. New York, 453 U.S. 454, 101 S.Ct. 2860 (1981) were unnecessary in that the merits of the underlying searches and seizures should never have been addressed. Moreover, there would be no need to resolve a vehicle search question by resorting to an "incident to arrest" standard if the interior of the car is not a constitutionally protected area.

This Court is now being called upon to resolve this issue, which is of critical concern to law enforcement interests as well as the general public. Can it be said that society is willing to delcare that motor vehicles are open to public view in the same way

that an open field is considered accessible? See Oliver v. United States, ___ U.S. ___, 104 S.Ct. 1735 (1984). Moreover, when an intrusion takes the form of the technological surveillance utilized in this case, then most certainly the Constitution must protect against the continuation of this law enforcement conduct.

II

EVIDENCE WHICH CAN ONLY BE OBSERVED THROUGH USE OF A HIGH POWERED TELESCOPIC CAMERA IS NOT IN PLAIN VIEW.

Use of high powered camera equipment to observe that which the naked eye could not alone discern constitutes an unlawful search. United States v. Taborda, 635 F.2d 131, 138-139 (2d Cir. 1980). As the trial court held in the present case, Officer Nieto intruded onto ABISLAIMAN's constitutionally protected area by

spying directly into the automobile with a sophisticated electronic device capable of making observations not readily available to a human being.

The plain view doctrine cannot be utilized to justify a search of an area only observable through the use of a high powered telescopic camera. Numerous cases, when considering the use of ultra-sophisticated spy technology, resolve search and seizure issues by finding that the Constitution does not permit such gross intrusion without the prior acquisition of a warrant. E.g., United States v. Taborda, supra; United States v. Kim, 415 F.Supp. 1252 (D. Ha. 1976); State v. Barnes, 390 So.2d 1243 (Fla. 1st DCA 1980), cert.denied, 399 So.2d 1145 (Fla. 1981); See also Wheeler v. State, 659 S.W.2d 381 (Tex. Crim. App. 1983)(After using an array of surveillance enhancement techniques,

officers employed a 600 millimeter lens and were able to peer through louvers to see contraband. The court found use of the lens went beyond the general rule allowing warrantless use of binoculars and therefore violated defendant's expectation of privacy).

The analysis used in these cases is correct, and is based on the approach taken by this Court in Katz v. United States, supra, which involved the determination of the boundaries of what was then state of the art law enforcement technology. In that seminal decision, this Court enunciated the principle that one has no legitimate expectation of privacy in any object which is exposed to plain view. The court in Katz stated "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389

U.S. at 351, 88 S.Ct. at 511.[3]

As this Court declared in Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 993 (1968), "[i]t has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." The justification for this reasoning is that one who places an item in plain view has not "exhibited an actual (subjective)

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[3] This Court's most recent decisions continue to rely on the conception of the purpose and scope of the Fourth Amendment that was enunciated in Katz. See, e.g., United States v. Jacobsen, 466 U.S. ___, ___ 104 S.Ct. 1652, 1659, (1984); Michigan v. Clifford, 464 U.S. ___, ___ 104 S.Ct. 641, 646, (1984); Illinois v. Andreas, 463 U.S. ___, ___ 103 S.Ct. 3319, 3323, (1983); United States v.Place, 462 U.S. ___, ___ 103 S.Ct. 2637, 2641, (1983); Texas v. Brown, 460 U.S. ___, ___ 103 S.Ct. 1535, 1542, (1983); United States v. Knotts, 460 U.S. ___, ___ 103 S.Ct. 1081, 1085, (1983).

expectation of privacy" in the object. Katz v. United States, supra at 361, 88 S.Ct. at 516.

Needless to say one does not expose to the public those items in a vehicle which may be viewed only through employment of a powerful sophisticated camera which enables its operator to monitor events and make visual observations which could not be done with the naked eye or the use of conventional instruments such as binoculars and flashlights. See State v. Barnes, supra at 1244. This is not a case in which the monitoring officer could have changed his position, bent down, or adjusted his view to a different angle so he could see inside the automobile. This is also not a situation like the one suggested in Texas v. Brown, ___ U.S. ___, 103 S.Ct. 1535, 1542 (1983), wherein this Court

stated:

> ...There is no legitimate expectation of privacy, Katz v. United States, supra, 389 U.S., at 361, 88 S.Ct., at 516 (1967) (Harlan, J., concurring); Smith v. Maryland, 442 u.S. 735, 739-745, 99 S.Ct. 2577, 2579-2583 (1979), shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.

Where a law enforcement officer is stationed in a location which is outside a constitutionally prohibited area and that officer is looking inside a constitutionally protected area, he has not made an illegal search within the Fourth Amendment. United States v. Bellina, supra at 1342; United States v. Burns, 624 F.2d 95, 100 (10th Cir. 1980). However, as the trial court held in the present case, Officer Nieto intruded onto ABISLAIMAN's constitutional rights by spying into a lawfully parked automobile in a private

location by using a sophisticated electronic device capable of making observations not otherwise available to a human being. The issue is not so readily resolved. The critical factor here is that the sophisticated technology utilized here does not simply enhance one's senses, but effectively gives that person the ability to do things that could not be otherwise done. While the Constitution does not reject the use of new technology, it certainly does not condone the use of highly advanced developments which effectively do away with constitutional rights.

Furthermore, ABISLAIMAN wholly agrees that the use of flashlights, searchlights, binoculars, and marine glasses are not prohibited by the Constitution. Texas v. Brown, supra at ____, 103 S.Ct. at 1541. However,

this case does not involve the use of any of the above instruments. The device used here is of a much more offensive nature. It did not simply enhance the use of the naked eye. Rather, it gave the officer ability far beyond sensory enhancement. Officer Nieto through the use of the high powered camera was able to be in more than one place at one time and could do things that could not otherwise be done.[4] Through use of the camera,

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[4] This impermissible action is analogous to that involved in Dow Chemcial Co. v. United States, 536 F.Supp. 1355 (E.D.Mich. 1982), where the court stopped the warrantless aerial photography of the Dow manufacturing plant by the EPA. The court was especially concerned with the use of high technology vision enhancers, holding that society would find it reasonable to limit the authority of a government with its "expanding arsenal of technologically advanced surveillance equipment.... This Court is not prepared to conclude that Dow must build a dome over its entire plant before it can be said to have manifested or (fn.cont.)

Officer Nieto could zoom into the vehicle -- in effect placing him inside a constitutionally protected area.

Courts have not been reluctant to suppress observations obtained through the use of telescopic instruments. For instance, in United States v. Kim, 415 F.Supp. 1252 (D. Ha. 1976), that federal court suppressed observations made by government agents who utilized a high powered telescope without a warrant to peer into a defendant's apartment one quarter mile away. The court recognized that:

> [T]he sophisticated visual aids available to the government can intrude on individual privacy as severely as the electronic surveillance in Katz [v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967)] or the wiretapping in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873 (1967).... If government agents have probable cause to suspect criminal activity and feel the need for telescopic

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exhibited an expectation of privacy."

> surveillance, they may apply for a warrant; otherwise, they have no right to peer into people's windows with special equipment not generally in use.

Id. at 1255-1256 (footnote omitted).

Similarly, in United States v. Taborda, 491 F.Supp. 50 (E.D.N.Y.), aff'd. in part and remanded, 635 F.2d 131 (2d Cir. 1980), the trial court suppressed evidence initially observed in the defendant's apartment through the use of high powered telescopic equipment. DEA agents conducted their surveillance by using a sophisticated telescope to look through the open windows of the defendant's apartment. A search warrant was issued by a magistrate based upon the telescope assisted observations. Suppressing the fruits of the subsequent search, the court held, at 52:

> [A] 'high powered' telescope is hardly less intrusive and offensive than a hidden microphone. Both

> devices could force us to close our lives in order to escape the government's watchful eyes and attentive ears. This Court therefore holds that this case is governed by the Katz decision and that the government must first obtain judicial sanction before using a telescope. (emphasis added).

The Taborda court carefully pointed out that leaving the window shades open did not diminish the defendant's legitimate expectation of privacy. The use of the high powered telescope made the search unreasonable because it permitted the observation of objects not readily discernable by the naked eye from 200 feet away. Id. at 53. On appeal by the government, the Second Circuit affirmed the conclusion that the use of high powered optical equipment to observe that which the naked eye could not alone discern constituted an unlawful search. United States v. Taborda, 635 F.2d 131, 138-139 (2d Cir. 1980).

The evidence in question here

was not in plain view, for the Petitioner never exposed his conduct to others, whether private citizens or government officials. Cf. United States v. Jacobsen, ___ U.S. ___, 104 S.Ct. 1652 (1984) (warrantless field test of substance contained in package discovered during a search by private freight carrier did not infringe upon any legitimate expectation of privacy). Therefore, the plain view doctrine cannot be utilized to negate ABISLAIMAN's legitimate expectation of privacy in the area searched. The use of the sophisticated high power camera intruded to an area in which ABISLAIMAN had a legitimate expectation of privacy. If this type of police conduct is not restricted, where will it stop? This Court must affirmatively act to stop this type of police conduct.

III

A DEFENDANT HAS STANDING TO CHALLENGE THE LEGALITY OF HIS ARREST AND EVIDENCE SEIZED AS A RESULT OF THE ILLEGAL ARREST MUST BE SUPPRESSED AS THE FRUIT OF THE POISONOUS TREE.

In order to effect an arrest, which is a type of seizure of the person, law enforcement officers must possess probable cause. Otherwise, the arrest or seizure offends the Fourth Amendment. Dunaway v. New York, 442 U.S. 200, 207, 99 S.Ct. 2248, 2254 (1979); Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311 (1949). If defendant's arrest is not based on probable cause, then evidence derivatively obtained from that arrest is inadmissible as the fruit of the original constitutional violation. See United States v. Crews, 445 U.S. 463, 471, 100 S.Ct. 1244, 1249 (1980); Wong Sun v. United States, 371 U.S. 471, 83

S.Ct. 407 (1963).

In this case, ABISLAIMAN had a reasonable expectation of privacy in and about his person. "The Fourth Amendment applies to all seizures of the person including seizures that involve only a brief detention short of arrest." Rakas v. Illinois, supra at 162 n.5, 99 S.Ct. at 439 n.5, citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). See Colorado v. Bannister, 449 U.S. 1, 101 S.Ct. 42 (1980)(there can be no question that the stopping of a vehicle and detention of its occupants constitutes a 'seizure' within the meaning of the Fourth Amendment).

The record is clear that when ABISLAIMAN was forced out of his car by the police in the parking lot of the hospital he was under arrest. (T. 12-13; R. 14-16). The only probable cause for ABISLAIMAN's arrest was obtained

through the unlawful search of his vehicle with the high powered telescopic camera. Therefore, ABISLAIMAN's arrest was unlawful and all evidence seized as the result of that arrest must be suppressed as the fruit of the poisonous tree.

ABISLAIMAN was illegally seized when asked to step out of his car. The seizure was illegal because there was no probable cause. Probable cause did not exist because all the facts within the officers' knowledge which would cause them to reasonably believe an offense had been committed, Brinegar v. United States, supra at 175-176, 69 S.Ct. at 1310-11; Carroll v. United States, supra at 162, 45 S.Ct. at 288, were obtained in violation of ABISLAIMAN's constitutional right to be free from unreasonable searches and seizures.

CONCLUSION

The issues involved in this petition go to the heart of our free society. This Court needs to address the serious Fourth Amendment policy questions involved in this case.

> [A]s technological capability of law enforcement agencies increases, the Fourth Amendment must grow in response. To permit governmental intrusions of the sort at issue in this case to remain uncontrolled would violate the basic foundations of privacy, security and decency which distinguish free societies from controlled societies.

United States v. Kim, supra at 1257. See Orwell, 1984 (1949).

Without clear guidelines from this Court as to the permissible use of technologically advanced law enforcement equipment, both the public and the criminal justice system suffers. Certiorari review is the only appropriate way to bring some clarity to this very troubled area.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Florida Third District Court of Appeal from which discretionary review by the Florida Supreme Court was denied.

Respectfully submitted,

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BY_____
EDWARD R. SHOHAT
BENEDICT P. KUEHNE
JOHN M. KIERNAN

A P P E N D I X

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO.: 82-1895 (Kogan)

THE STATE OF FLORIDA, :

Plaintiff, :

vs. :

JORGE ABISLAIMAN, :

Defendant. :

ORDER GRANTING MOTION TO
SUPPRESS ILLEGALLY SEIZED
EVIDENCE AND ORAL STATEMENTS

THIS CAUSE came on to be heard upon the Motion(s) of the Defendant, JORGE ABISLAIMAN, to suppress illegally obtained evidence and oral statements, pursuant to Rule 3.190 (h) (i), Florida Rules of Criminal Procedure, and this Court, after taking witness' testimony, and considering the arguments and memoranda submitted by counsel, makes the following findings of fact and

conclusions of law, and hereby enters its order that the Motion(s) to Suppress be Granted:

FINDINGS OF FACT

1. The Defendant was arrested on January 21, 1982, and charged with possession of a concealed firearm, Florida Statutes, Section 790.01, possession of five (5) Quaaludes and possession of 3.3 grams of marijuana, Florida Statutes, Section 893.13. The arrest was made by City of Miami police officers, Carlos Nieto and Raymond Castillo, on the grounds of Mercy Hospital, within the jurisdiction of the City of Miami Police.

2. At the time of the arrest, Officer Nieto was working in an off-duty capacity for Mercy Hospital, but in full uniform. Although Officer Nieto was assisting the Mercy Hospital Security Officers, he at all times held himself

out to be an officer for the City of Miami. Officer Nieto's function was to assist the hospital security personnel and to independently investigate violations of the laws of the State of Florida.

3. At approximately 2:30 A.M., on the date of the arrest, Officer Nieto was inside the Mercy Hospital security camera monitor room. Mercy Hospital has numerous security cameras located both inside the hospital and on the grounds outside. The Central Security Room contains television monitors and remote control equipment to operate the security cameras. The security camera involved in this case is located on a tower in the parking lot, near the emergency room entrance, approximately 75 to 100 yards from the Monitor Room.

4. By viewing the television monitors, Officer Nieto observed the

Defendant's vehicle as it pulled into a legal parking space, near the emergency room entrance. The Defendant was with a female companion. After observing the occupants in the vehicle for several minutes, Nieto's attention became focused upon the Defendant. However, Nieto initially saw no illegal activity in or about the vehicle.

5. Officer Nieto, using the remote control equipment in the monitor room, repositioned the tower camera and activated the zoom lens to look into the Defendant's automobile to see what the Defendant was doing. Nieto testified that this camera is powerful enough to allow him to look into the vehicle and readily observe all movement therein without leaving the hospital security office. Thus, Officer Nieto's employment of the zoom lens camera allowed him to observe objects and

movements that he could not otherwise observe with the naked eye.

6. With the camera system, Nieto observed the Defendant, "rolling" what appeared to be a cigarette. Nieto could not tell whether this cigarette contained ordinary tabacco or cannibis. Nieto continued his electronic surveillance of the Defendant and saw what appeared to be a revolver in the Defendant's waistband when he lifted his shirt. According to Nieto, the Defendant removed the revolver from his waistband and placed it on the floor of the car in front of the driver's seat.

7. As a result of these observations, involving a potential violation of the Florida Statutes regarding the possession of concealed firearms and narcotics, Nieto radioed to his dispatcher for a marked unit to

assist him in a possible arrest. Officer Raymond Castillo was dispatched to assist Nieto's investigation. Officer Nieto, then accompanied by Officer Castillo, proceeded out to the Defendant's vehicle in the parking lot and asked both occupants to exit the vehicle. After the Defendant got out and was frisked for weapons, Nieto reached into the vehicle to search for the revolver. The weapon was located on the floor of the vehicle, in front of the driver's seat. When Nieto asked the Defendant about the gun, he allegedly responded that the gun was there because of Miami's high crime rate.

8. The Defendant was placed under arrest for the offense of carrying a concealed firearm, and was told that his vehicle was being impounded. A decision to impound the vehicle had been made despite the fact that it was lawfully

parked and posed no threat to traffic safety in the area. Officer Nieto, the only witness to testify for the State at the suppression hearing, admits that he never advised the Defendant of alternatives to impoundment, i.e.: that he could leave the vehicle in the parking lot, or have a friend or relative come to pick it up. Officer Nieto does not know whether such alternatives were given to the Defendant by the other arresting officer, Raymond Castillo.

9. Before the Defendant was transported from the scene, the vehicle was thoroughly searched by the officers, pursuant to a pre-impoundment inventory. The five (5) Quaaludes were discovered on the floor of the vehicle, wrapped in a napkin, and the 3.3 grams of marijuana was discovered on or near the passengers seat.[1]

10. The Defendant moved to suppress the seized firearm and controled substances as the product of an illegal search and seizure. The Defendant also moved to suppress the alleged statements as the product of an illegal arrest.

CONCLUSIONS OF LAW

The Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Constitution guarantee to all people the right "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures". Warrantless searches and seizures are per se unreasonable as a matter of law, unless

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1/ According to Officer Castillo's deposition testimony, the Defendant claimed that everything in the vehicle was his, and that he had a prescription for the Quaaludes. Later, while in Officer Castillo's police vehicle, he admitted that he had no prescription for the Quaaludes.

the prosecuting agency can show that the seizure and search fall within one of the few exeptions to the warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, (1971); Stover v. California, 376 U.S. 483 (1964).

In Norman v. State, 379 So.2d 643 (Fla. 1980), our Supreme Court recognized that one who owns or lawfully possesses or controls property does in all likelihood have a "legitimate expectation of privacy by virtue of his right to exclude". See also, Rakas v. Illinois; 439 U.S. 128, 99 S.Ct. 2556 (1980). The interior of one's automobile, like any other area which the Defendant chooses not to expose to public or governmental scrutiny, is an area in which the Defendant has a legitimate expectation of privacy protected by the Fourth Amendment. Rakas v. Illinois, supra.; State v. Adamosky,

407 So.2d 983 (Fla. 4th DCA 1981). In the present case, it was clearly established that the subject motor vehicle was the property of and/or in the exclusive control of the Defendant, ABISLAIMAN, and his expectation of privacy therein was thus legitimate.

The pivotal issue in this case is whether the warrantless search and the subsequent seizure in this cause can be sustained as a lawful "open view" observation by Officer Nieto. It is the conclusion of this Court that Officer Nieto's use of the high powered telescopic camera constituted an unlawful search of the interior of the Defendant's vehicle. Thus, the subsequently seized firearm and controlled substances must be suppressed.

In Ensor v. State, 403 So.2d 349 (Fla. 1981), the Defendant's vehicle had

been lawfully stopped for a traffic violation. While two officers questioned the Defendant about his erratic driving behavior, two other officers looked into the vehicle and observed a firearm on the floor of the passenger side. The officer's visual observation of the weapon was upheld by the Supreme Court as the product of a lawful "open view" observation. The Court then upheld the subsequent seizure of the weapon on the basis that the visual observation provided probable cause, and the movable character of the vehicle created sufficient exigent circumstances to excuse the necessity for a warrant. See,e.g. Albo v. State, 379 So.2d 648 (Fla. 1980); Carroll v. United States, 267 U.S. 132 (1925). For the reasons stated below, the initial observation by Officer Nieto was not a lawful "open view" observation as that

term is defined in Ensor v. State, supra., and was thus illegal.

In Pomerantz v. State, 372 So.2d 104 (Fla. 3rd DCA 1979),.the Court identified the applicable criteria for a lawful plain sight discovery of evidence as follows, to wit:

> 1. The police must observe the evidence in plain sight without the benefit of a search,
>
> 2. The police must have a legal right to be where they are to make the plain sight observation, and
>
> 3. The police must have probable cause to believe the evidence seen constitutes contraband...Id. 110.

See also, State v. Melendez, 392 So.2d 587 (4th DCA 1981); State v. Morsman, 394 So.2d 408 (1981).

Specifically, the use of the high powered zoom lens camera equipment violates the foregoing test because, (1) the initial observation of the firearm was the product of an unlawful search,

(2) the observation was not inadvertent, and (3) the police were not in a place where they had a lawful right to be, i.e.: through the use of the electronic camera equipment Officer Nieto actually had an "eye" in the Defendant's vehicle. The use of this ultra-sophisticated camera equipment is no different than the electronic eavesdropping devises condemened by the Supreme Court in the landmark case of Katz v. United States, 389 U.S. 347 (1967).

In State v. Barnes, 390 So.2d 1243 (Fla. 1st DCA 1980); cert. denied, 399 So.2d 1145 (Fla. 1981), a deputy sheriff observed a marijuana plant in the defendant's open yard with a pair of binoculars, but could not readily identify the plant as contraband from his vantage point. The sherriff's deputy returned to the property

adjoining the defendant's yard with a high powered telescope and this time the plant was identified as marijuana. A warrantless seizure subsequently ensued. The Trial court granted the motion to suppress and the State appealed.

On appeal, the State argued that the seized plant was in plain view and the search was thus not the product of an unlawful search. The First District rejected the State's argument as follows:

> The law is clear that what a person normally exposes to the public is not the subject of Fourth Amendment protections. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). But the public to whom something is knowingly exposed must be "the ordinary run of people, not those who happen to possess powerful and sophisticated devices and the curiosity to use them to spy on their fellows." (citation omitted).

* * * *

> The plain view exception to the warrant requirement cannot in our opinion be used to justify the seizure of evidence clearly identifiable only through a telescope, the warrantless use of which constitutes an intrusion into an area not reasonably expected to be exposed to the public. Id. at 1244.

Several recent decisions in the Federal Courts are also highly persuasive in this Court's determination that Officer Nieto's observation of the firearm was the product of an unlawful search. In United States v. Taborda, 491 F. Supp. 50 (E.D.N.Y. 1980); aff'd. in part and remanded for further proceedings, 635 F.2d 131 (2d Cir. 1980), the Trial court entered an order suppressing evidence initially observed in the defendant's apartment through the use of telescope equipment. DEA agents conducted their surveillance by using a high powered telescope to look through the open windows of the defendant's

apartment. A search warrant was issued by a magistrate based upon the telescope assisted observations.

In suppressing the fruits of the subsequent search the Trial court held:

> "a 'high powered' telescope is hardly less intrusive and offensive than a hidden microphone. Both devices could force us to close our lives in order to escape the government's watchful eyes and attentive ears. This Court therefore holds that this case is governed by the Katz decision and that the government must first obtain judicial sanction before using a telescope." (emphasis added). 491 F.Supp. at 52.

The Taborda Court carefully pointed out that the fact that the Defendant had left the window shades open did not diminish his legitimate expectation of privacy. The use of the telescope made the search unreasonable because it permitted the observation of objects not readily discernable by the naked eye from 200 feet away. Id. at 53.

On appeal by the goverment, the Second Circuit affirmed the Trial court's legal conclusion that the use of high powered optical equipment to observe that which the naked eye could not alone discern constituted an unlawful search. United States v. Taborda, 635 F.2d 131, 138-139 (2nd Cir. 1980). The Court distinguished prior decisions which upheld the use of a flashlight to observe items at night that would otherwise be readily observable in broad daylight. United States v. Lee, 274 U.S. 559 (1927). Likewise, Florida cases upholding night observations assisted by a flashlight are distinguishable from the present case involving sophisticated optical equipment. See, State v. Hall, 376 So.2d 276 (Fla. 3rd DCA 1979); State v. Roker, 290 So.2d 525 (Fla. 3rd DCA 1974).

There is a bright line distinction between a lawful "open view" observation made with the naked eye and an unlawful search effected through the use of high powered telescopic camera equipment. The use of this equipment to observe that which Officer Nieto otherwise could not see in the Defendant's automobile violated the Defendant's legitimate expectation of privacy in the interior of his automobile. Based upon the foregoing principles, grounded in the Florida and Federal Constitutions and the relevant case law thereunder, the Defendant's motion to supress the seized firearm is granted as the product of an unlawful search and seizure.

The search and ultimate seizure of the five (5) Quaaludes and the 3.3 grams of marijuana was also unlawful as beyond the scope of a lawful inventory search.[2/] In State v. Miller, 403 So.2d

1307 (Fla. 1981), the Supreme Court handed down a comprehensive opinion dealing with the issue of automobile inventory searches. Miller makes it clear that the purpose of an inventory search is exclusively a caretaking function for the protection of the Defendant and his property. An inventory search may not be conducted in order to discover evidence of a crime, and a decision to impound a vehicle to avoid the warrant requirement is unlawful. Id. at 1312.

In the present case, the search of the vehicle which uncovered the

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2/ Officer Nieto did not base his post arrest search on the theory of a search incident to arrest. Rather, both he and Officer Castillo had concluded the arrest of the Defendant but decided to impound the vehicle and conduct an inventory prior to towing. Granville v. State, 348 So.2d 641 (Fla. 2d DCA 1977); Hicks v. State, ____So.2d____(Fla. 1st DCA 1981) (Fla. Law Weekly, Vol. 6, No. 22, p. 1186).

narcotics contraband does not fall within the inventory search exeption to the warrant requirement as originally set forth in South Dakota v. Opperman, 428 U.S. 364 (1976). There was no necessity to impound Defendant Abislaiman's vehicle. It was not a hazzard to traffic and the Defendant was willing to the leave the vehicle on the scene as long as it was properly locked. The case law is clear that while the police need not advise the Defendant of every option to impoundment, this procedure is for the Defendant's protection, and he can leave the vehicle where it is lawfully parked. The protective rational of the inventory search exeption does not apply where, as here, the Defendant could have, and was willing to, leave the vehicle on the scene. Chuze v. State, 330 So.2d 166 (Fla. 4th DCA 1976);

Altman v. State, 335 So.2d 626 (Fla. 2nd DCA 1976). The mere fact that the individual arrested happens to be in a motor vehicle does not justify an inventory or other search. Miller v. State, supra. at 1313. Thus, the warrantless search of the Defendant's vehicle was unreasonable, and the fruits thereof must be suppressed.3/

Finally, the incriminating statements made by the Defendant must also be suppressed because they are the direct result of his illegal arrest. Because there are no independent intervening factors that dissipate the taint of the prior illegality, said

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3/ Alternatively, the Court concludes that the search of the interior of the vehicle, subsequent to the defendant's arrest, is fatally tainted by the prior illegal search, seizure and arrest on the concealed firearm charge. Norman v. State, 379 So.2d 643 (Fla. 1980); Wong Sun v. United States, 83 Supreme Court 407 (1963).

statements are not admissable. Dunaway v. New York, 442 U.S. 200, 99 Supreme Court 2248 (1979); Wong Sun v. United States, 83 Supreme Court 407 (1963). The mere fact that Miranda warnings might have been given at some point subsequent to the Defendant's arrest, does not purge the taint of the illegal arrest. Busch v. State, 392 So.2d 272 (Fla. 1st DCA 1980).

As with a search that follows a prior illegal arrest, based on the Defendant's alleged consent, the totallity of the circumstances surrounding the voluntariness of the statement must be examined. In the present case, Officer Nieto's testimony leaves a great deal of doubt as to whether the Defendant truly and completely waived his right to remain silent since it is not clear whether the various communications in English and/or

Spanish were understood by the Defendant prior to the statements. See, e.g., Brown v. United States, 384 U.S. 436 (1966). The totality of the facts in this case render the statements made by the Defendant inadmissable as the product of the unlawful search and seizure.

Based upon the foregoing facts and law, it is

ORDERED AND ADJUDGED:

1. That the Defendant's motion to supress the seized firearm, the five (5) Quaaludes and the 3.3 grams of marijuana is Granted.

2. That the Defendant's motion to supress all oral statements is Granted.

DONE AND ORDERED at Miami, Dade County, Florida, this_____day of August, 1982.

/s/_____
CIRCUIT COURT JUDGE

cc: State Attorneys Office
Bierman, Sonnett, Beiley & Shohat, P.A.

The STATE of Florida, Appellant,

v.

Jorge ABISLAIMAN, Appellee.

No. 82-1944

District Court of Appeal of Florida,
Third District.

Aug. 16, 1983.

Rehearing Denied Sept. 28, 1983.

Jim Smith, Atty. Gen. and Calvin L. Fox, Asst. Atty. Gen., for appellant.

Bierman, Sonnett, Beiley, Shohat & Sale and Benedict P. Kuehne, Miami, for appellee.

Before NESBITT, DANIEL S. PEARSON and JORGENSON, JJ.

NESBITT, Judge.

The defendant, Jorge Abislaiman, was charged with carrying a concealed firearm, possession of a controlled substance, and possession of cannabis. We have for review an order granting his motion to suppress evidence.

Abislaiman drove[1/] into the emergency room parking lot of Mercy Hospital at

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1/ The record does not reveal whether or not Abislaiman owned the automobile he was driving.

2:30 a.m. on January 21, 1982. He was accompanied by a female. He parked at the end of the lot and remained there for three to five minutes with no one entering or exiting the automobile. Abislaiman's actions were observed via security camera and monitor by Officer Carlos Nieto, an off-duty City of Miami Police Officer, working with security personnel at Mercy Hospital.[2] The hospital's security camera monitoring room, where Nieto was situated, contains equipment allowing for remote control operation of the cameras which are perched upon poles or light standards. His suspicions aroused, Nieto maneuvered the camera facing Abislaiman and activated its zoom lens so that he could see directly into the automobile's windshield. Officer Nieto observed Abislaiman rolling an unidentifiable substance in cigarette paper and then saw him raise his shirt, remove a gun from his waistband, and place it on the floor of the automobile in front of the driver's seat. Nieto then radioed his dispatcher for a marked unit to assist him in a possible arrest. When the other officer arrived, he and Nieto approached Abislaiman's car and asked both occupants to step out. They complied and as Abislaiman was frisked for weapons or shortly thereafter, Nieto reached into the car and located the gun. Abislaiman was then arrested for

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[2] Since it was not made an issue in the trial court, the state conceded for purposes of this appeal that Officer Nieto's activities at all relevant times constituted state action.

carrying a concealed firearm. He was read his Miranda rights after which he made certain incriminating statements. Also seized from Abislaiman's vehicle was a small amount of marijuana in a clear plastic bag visible to Officer Nieto as he reached for the revolver and several quaaludes only the wrapper of which, a tissue, was visible at that time. The trial court suppressed all the physical evidence seized from Abislaiman, as well as the inculpatory statements.

[1] We reserve the portion of the trial court's order suppressing the physical evidence. In doing so, we expressly do not reach the issue of whether Officer Nieto's use of the zoom lens camera constituted a search within the ambit of the Fourth Amendment to the United States Constitution or Article I, Section 12 of the Florida Constitution, compare United States v. Taborda, 635 F.2d 131 (2d Cir. 1980) (use of telescope constituted a search); United States v. Kim, 415 F.Supp. 1252 (D.Haw. 1976) (use of high-powered telescope constituted a search); and State v. Barnes, 390 So.2d 1243 (Fla. 1st DCA 1980) (use of telescope to confirm that seen with binoculars constituted a search) with Bernstiel v. State, 416 So.2d 827 (Fla. 5th DCA 1982) (use of binoculars to confirm that seen with naked eye did not constitute a search), but hold that Abislaiman had no reasonable expectation of privacy even from such an intrusion as occurred here. See Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Because accidents and illnesses occur at all hours, a hospital's emergency room parking lot is one of the few places where one would expect a certain amount of traffic would be medical and ambulance personnel, see Buchanan v. State, 432 So.2d 147 (Fla. 1st DCA 1983) (defendant did not have a reasonable expectation of privacy inside a busy hospital emergency room where medical personnel were constantly walking in and out and where he could have expected to remain only a few hours at most) and some would surely be police officers who, properly on the premises, would have been free to crane their necks or bend over in order to glimpse the interior of Abislaiman's vehicle. See James v. United States, 418 F.2d 1150, 1151, n. 1 (D.C.Cir.1969); but cf. United States v. Ward, 546 F.Supp. 300, 310 (W.D.Ark.1982) (unusual angle or height of enhanced visual surveillance considered in determining degree of intrusion upon expectation of privacy). Furthermore, Officer Nieto testified as to two recent incidents of violence that had occurred on Mercy Hospital grounds. The hospital certainly has a right to protect its patients, employees, and property by employing reasonable security measures. Thus, any subjective expectation of privacy Abislaiman may have formed while parked in the hospital's lot was simply not one which society is prepared to recognize as reasonable. Katz v. United States, supra (Harlan, J., concurring), adopted, Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

[2, 3] Officer Nieto's use of the

zoom lens camera was, therefore, not unlawful and he was clearly entitled under Section 901.15(1), Florida Statutes (1981) to arrest Abislaiman, having actually witnessed the latter commit the felony of carrying a concealed firearm, § 790.01(2), Fla.Stat. (1981). The search of the passenger compartment of the vehicle and the examination of the contents of any containers found therein were then justified as contemporaneous incidents of the lawful custodial arrest of Abislaiman, its recent occupant, notwithstanding that he had been removed from the vehicle, New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981); State v. Valdes, 423 So.2d 944 (Fla. 3d DCA 1982), that portions of the search may have preceded his formal arrest, Acosta v. State, 431 So.2d 715 (Fla. 3d DCA 1983); Thomas v. State, 395 So.2d 280 (Fla. 3d DCA 1981), and that Officer Nieto in testimony at the suppression hearing characterized one part of the search, conducted with the defendant still at the scene, as an inventory search. State v. Padron, 425 So.2d 644 (Fla. 3d DCA 1983); State v. Valdes, supra. The physical evidence should not have been suppressed.

The trial court suppressed Abislaiman's oral admissions not only as fruit of the poisonous tree, the illegal arrest, but as made without an understanding of the concededly-adminstered Miranda warnings. The poisonous tree now detoxified, we need not concern ourselves with the first independent ground for suppression, but proceed to the second ground.

[4] It appears from the record that Officer Nieto, who was the only witness to testify at the suppression hearing, was somewhat confused as to whether his fellow officer read Abislaiman his rights in Spanish or English and as to whether Abislaiman answered in Spanish or English. Nieto initially testified that he didn't remember whether his rights were read in English or Spanish. He later responded that the rights were read in Spanish and that he didn't remember whether Abislaiman answered in Spanish or English. Nieto also testified that Abislaiman appeared to understand English but that he made his incriminating statement[3] in Spanish. Although a likely inference from all this confusion is that both Nieto and Abislaiman were bilingual, the trial court found that Nieto just was not credible concerning this particular issue. On this record, we cannot say that the trial court erred in its assessment or in its decision to suppress the oral statements as emanating from one who did not understand his rights. McNamara v. State, 357 So.2d 410 (Fla.1978); Lane v. State, 353 So.2d 194 (Fla. 3d DCA 1977), cert. denied, 358 So.2d 131 (Fla.1978); Von Horn v. State, 334 So.2d 43 (Fla. 3d DCA 1976), cert. denied, 341 So.2d 1086 (Fla. 1976). The order under review is, therefore, affirmed in part and reversed in part and the case is remanded for further proceedings consistent with this

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3/ Officer Nieto was privy to only one of the statements sought to be suppressed.

opinion.

Affirmed in part; reversed in part and remanded.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1983

WEDNESDAY, SEPTEMBER 28, 1983

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NO. 82-1944

JORGE ABISLAIMAN, **

Appellee. **

Upon consideration, appellee's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of Appeal, Third District

By /s/
Deputy Clerk

cc: Calvin Fox
Benedict P. Kuehne

/b

SUPREME COURT OF FLORIDA

WEDNESDAY, APRIL 18, 1984

JORGE ABISLAIMAN, Petitioner,	)	CASE NO. 64,449
v.	)	District Court of Appeal, 3d District
STATE OF FLORIDA, Respondent.	)	No. 82-1944

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ALDERMAN, C.J., BOYD, OVERTON, EHRLICH and SHAW, JJ., concur

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

by: /s/
Deputy Clerk

TC
cc: Hon. Louis J. Spallone, Clerk
Hon. Gerald Kogan, Judge
Hon. Richard P. Brinker, Clerk

Edward R. Shohat, Esquire
Benedict P. Kuehne, Esquire
Calvin L. Fox, Esquire